

Newsletter October 2013

Newsletter – FINMA-Circular 2013/9 Distribution of Collective Investment Schemes

The FINMA-Circular 2013/9 “Distribution of Collective Investment Schemes” (hereafter the “Circular”) of 28 August 2013 entered into force on 1 October 2013.

The Circular replaces the FINMA-Circular 08/8 “Public Advertising Collective Investment Schemes” of 20 November 2008.

The Circular specifies the term of distribution of collective investment schemes (hereafter the “CIS”) in Switzerland as used in the Swiss Collective Investment Schemes legislation since the 1 March 2013.

While the Circular reports to some extent what is already written in the Collective Investment Schemes Act (CISA) and the ordinance, only such topics are mentioned hereafter which serve for clarification of the CISA and the ordinance.

I. Purpose and Scope

The purpose of the Circular is to concretize the term of distribution and to determine which activities qualify as distribution.

The Circular is addressed to – among others – Swiss representatives of CIS, distributors and all persons who distribute CIS.

II. General Terms

A. Distribution

a) Offering and advertising

Distribution is defined as any offering of CIS and any advertising for CIS that is not exclusively addressed to specific **investors** such as regulated financial intermediaries, such as

banks, securities dealers, fund management companies, asset managers of CIS, central banks and regulated insurance institutions. The law defines some activities which do not qualify as distribution (see afterwards section “Exceptions that are not deemed to be distribution”).

The offering of CIS or advertising for CIS includes any type of activity whose purpose is the purchase of units of CIS by an investor. The means which are used are in the principal of no relevance.

Distribution includes also indirect distribution. Therefore, the offering of and the advertising for “managed fund accounts” is considered to be distribution.

b) Exceptions that are not deemed to be distribution

The following activities do not qualify as distribution and are therefore not subject to the CISA.

- aa) The offering and advertising addressed to regulated financial intermediaries such as banks, securities dealers, fund management companies, asset managers of CIS and central banks and regulated insurance institutions.
- bb) The provision of information as well as the simple execution of transactions (execution only transaction).
- cc) The provision of information as well as the acquisition of CIS upon the investor’s own initiative (reverse solicitation), in particular in the context of long-term, non-gratuitous written advisory agree-

ments or a written asset management agreement.

However, if a third party, who is not contractual party to the written advisory agreement or the written asset management agreement, respectively, offers or promotes CIS to the investor or the asset advisor or asset manager respectively, such activity of the third party qualifies as distribution according to the CISA.

If an independent asset manager who is not subject to a code of conduct recognized by the FINMA provides information on or acquires CIS in the context of an asset management agreement, such asset manager may only purchase Swiss CIS and exclusively in the context of an asset management agreement concluded with a qualified investor according to the Swiss law (see section II. B. below).

dd) The publication of prices, net asset values and tax data by regulated financial intermediaries.

ee) The offering of stock options schemes in the form of CIS to employees.

B. Qualified Investors

The following persons are qualified investors under CISA:

- regulated financial intermediaries such as banks, securities dealers, fund management companies, asset managers of collective investment schemes, central banks
- regulated insurance institutions
- public entities and retirement benefits institutions with professional treasury operations
- companies with professional treasury operations
- high net worth individuals as defined in the CISA and CISO as follows:

High net worth individuals must fulfil the following conditions at the moment of the acquisition of a collective investment scheme:

- The investor proves that he/she has knowledge of the market that is necessary to understand the risks of the investments based on his/her personal education and personal professional experience or based on a comparable experience in the financial sector and that he/she has assets of at least CHF 500,000;
or
the investor confirms in writing to own assets of at least CHF 5,000,000
- and the investor has declared in writing that he/she would like to qualify as qualified investor (so called “opting in”). Without such opting in the investor does not qualify as qualified investor even if the conditions mentioned above are fulfilled.

The Circular specifies that the term “comparable experience” means that an investor has to conclude in the relevant market an average of 10 transactions of substantial volume per quarter in the last four foregoing quarters.

Furthermore, high net worth individuals who did not opt in until 1 March 2015 will no longer be able to invest in collective investment schemes reserved to qualified investors. Moreover, if they are invested in a CIS for qualified investors, but no longer comply with the definition of the law of a high net worth individuals they are not forced to de-invest.

- investors who entered into a written asset management agreement with banks, securities dealers, fund management companies, asset managers of collective investment schemes or with an independent asset manager who fulfils the following conditions: The independent asset manager must be subject to the Federal Act on Anti-Money Laundering and to the rules of conduct of an organisation of his/her industry which are recognized as minimal standard by the FINMA and the asset management agreement must comply with the guidelines of an organisation of his/her industry, recognized as minimal standard by the FINMA.

However, these investors may declare in writing that they do not want to be considered as qualified investors (so called "opting out").

C. Distribution to qualified and non-qualified Investors

Provided that distribution activities qualify as distribution in the term of the law and are addressed to qualified investors such distribution is considered to be distribution to qualified investors.

Distribution activities towards an independent asset manager qualify as distribution to qualified investors, provided that the independent asset manager undertakes in writing, to use the information only for clients who are qualified investors.

Distribution activities towards a qualified investor without involvement of the above mentioned supervised financial intermediary or independent asset manager, respectively, are deemed to be distribution to non-qualified investors.

III. Distribution by Internet

The Circular specifies the internet-based distribution as follows:

A. General Aspects

The content of a website whose purpose is the acquisition of shares in a CIS by an investor qualifies as distribution.

As websites have cross-border effects, the corresponding provisions of the foreign countries must be taken into consideration as well.

a) Distribution in Switzerland

If it is obvious from the overall impression that there is a link to Switzerland, it is assumed that a website is targeting Swiss investors. When assessing the overall impression, the following indicators are of relevance:

- the website explicitly addresses investors domiciled in Switzerland;

- the contact address is in Switzerland or the representatives, distributors, paying agents or other financial intermediaries are domiciled in Switzerland;
- net asset values, issue or redemption prices are published in Swiss Francs;
- an official Swiss language is used (this indicator is only valid in conjunction with one or several other indicators);
- the text refers to Swiss or foreign legal provisions which may be of interest to persons domiciled in Switzerland (e.g. the presentation of fiscal advantages of the collective investment scheme's domicile);
- hyperlinks to other websites or references to other media (newspapers, radio, TV stations, etc.) which provide a Swiss Context.

If a website addresses to Swiss investors and the offers are not only accessible to regulated financial intermediaries such as banks, securities dealers, fund management companies, asset managers of CIS, central banks and regulated insurance institutions, such website is considered to be distribution in Switzerland. The person responsible for the website must meet all requirements for distribution to qualified and non-qualified investors in Switzerland by internet.

A website is not considered to be distribution in Switzerland, if it explicitly excludes an offer to investors in Switzerland (disclaimer) or if it contains an access limitation towards investors in Switzerland.

aa) Disclaimer

A visitor to a website may not circumvent the disclaimer. The disclaimer must appear before the potential visitor has access to the website's content. If units of CIS can be subscribed online, the disclaimer must be showed at the moment in which the potential investor contacts the online distributor in order to subscribe.

A general disclaimer stating that the website is not considered as distribution in countries for

which the distributor does not hold a distribution licence is not sufficient.

bb) Access restrictions to the website

The access restrictions must be able to discern the potential investor's domicile or residence. Distributors may rely on the information provided by the website visitors.

b) Discussion sites

Entering a "discussion site" is not considered as distribution. However, if these sites give an overall impression that they are referring to Switzerland, these sites must be considered as distribution.

B. Distribution to qualified investors in Switzerland by the internet

A website which is addressed exclusively to qualified investors such as public entities and retirement benefits institutions with professional treasury operations, companies with professional treasury operations, high net worth individuals who opted in or to an independent asset manager who undertakes in writing to use the information only for qualified investors, is considered as distribution to qualified investors in Switzerland.

a) Distribution license

The person responsible for the website domiciled in Switzerland requires an authorisation for distribution if the CIS are not Swiss CIS.

The person responsible for the website with registered office abroad must be an authorised financial intermediary in his/her country of domicile. He/she has to enter into a written distribution agreement with the respective Swiss representatives.

b) Website requirements

The website addressed to qualified investors in Switzerland must either have a disclaimer or an access restriction to the website.

aa) Disclaimer

The general disclaimer must inform the Swiss investor that the website is directed exclusively to qualified investors. The disclaimer is not to

be considered as a check whether the investor is a qualified or a non-qualified investor at the moment of the acquisition of the CIS.

In case that the website offers CIS for which no Swiss representative or paying agent is appointed, the website must display an additional disclaimer which indicates that these investment schemes are not allowed for distribution in Switzerland. If only part of these CIS have a Swiss representative and paying agent, these funds must be specified.

bb) Access restrictions to the website

The access restriction must be able to discern the category of investor.

The provider of the website may rely on the information provided by the visitor of the website. The information provided does not qualify as check whether the investor is a qualified investor or non-qualified investor at the moment of the acquisition of the CIS.

In case that the website offers also CIS, which have not appointed a Swiss representative or a paying agent in Switzerland, the qualified investors shall only have access to websites with indication **to CIS, for** which a Swiss representative and paying agent in Switzerland have been appointed.

C. Distribution to non-qualified investors in Switzerland by the Internet

The website that addresses qualified investors and non-qualified investors in Switzerland is considered as distribution to non-qualified investors as distribution in Switzerland.

a) Distribution license

The person responsible of the website must have an authorisation for distribution according to the requirements of the Swiss law.

b) Website requirements

If the website offers additionally to the registered CIS also non-registered CIS, the website must have either a disclaimer or an access restriction to the website.

aa) Disclaimer

If there is no authorisation for distribution from the FINMA, the disclaimer must explicitly state that the respective CIS are not allowed for distribution to non-qualified investors in Switzerland. If some of the CIS are allowed for distribution, these must be specified.

The disclaimer is not to be considered as a check whether the investor is a qualified investor or a non-qualified investor at the moment of the acquisition of the CIS.

bb) Access restrictions to the website

The access restriction must be able to discern the category of investor.

The provider of the website may rely on the information provided by the visitor of the website. The information provided does not qualify as a check whether the investor is a qualified investor or a non-qualified investor at the moment of the acquisition of the CIS.

Non-qualified investors may only have access to websites which exclusively have references to CIS which are authorised in Switzerland.

The content of this Newsletter does not represent legal advice and may not be used as such. For a personal consultation, please get in touch with your contact at Suter Howald Attorneys at Law. Should you have further questions in relation to the topics in this Newsletter, please contact:

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